A **PREMA GANASON & ANOR**

v.

RAVINDRAN THARUMALINGGAM & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
LEE HENG CHEONG JC
[CIVIL SUIT NO: 21NCVC-3-01-2013]
17 DECEMBER 2013

C ***TORT:*** *Assault and battery - Gun injury - Police officer husband shoots at wife and wife's brother - Whether gunshots fired accidental shots - Duty of care - Whether breached - Whether police officer wrongfully utilised revolver to shoot plaintiffs instead of protecting public - Whether there was connection between wrongful acts of police officer and official* D *duties he was entrusted with - Whether police officer acted in his personal capacity - Whether act committed within official scope of employment - Whether employers vicariously liable - Whether police officer intended to harm plaintiffs causing anguish and distress - Whether a proper case for awarding exemplary and aggravated damages*

E ***TORT:*** *Assault and battery - Husband and wife - Police officer husband shoots at wife and wife's brother - Whether gunshots fired accidental shots - Duty of care - Whether breached - Whether police officer wrongfully utilised revolver to shoot plaintiffs instead of protecting public - Whether* F *there was connection between wrongful acts of police officer and official duties which he was entrusted with - Whether police officer acted in his personal capacity - Whether act committed within official scope of employment - Whether employers vicariously liable - Whether police officer intended to harm plaintiffs causing anguish and distress - Exemplary and aggravated damages - Whether awarded*

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The first defendant, a police officer, and the first plaintiff were having marital problems. On 2 March 2010, at around 9.20pm, the first defendant had arrived at the first plaintiff's house to meet with the first plaintiff. At the time, the first defendant was on H 24 hours duty as a driver of the Transportation Branch of the Criminal Investigation Department for Dang Wangi Police Station and had been supplied with a .38 Smith & Wesson revolver. It was the plaintiff's case that as she was walking towards her room to collect and return jewelleries that the first defendant had given I her, she had been pushed from behind by the first defendant and had fallen down onto the floor. The first defendant had then immediately pointed the said gun at the first plaintiff's head and fired shots. The second plaintiff ('PW4'), the brother of the first

plaintiff, in his testimony, said that he heard gunshots and rushed out to see that PW2, the plaintiffs' father, was struggling with the first defendant to gain control over the said gun. In the process of struggling with the first defendant, the second plaintiff was shot in the chest. In essence, the plaintiffs' claim herein against the first defendant was for the torts of assault, battery and negligence. The second defendant, who was authorised to instruct and control the duties of the Royal Malaysian Police Personnel and the third defendant as the Government of Malaysia, were both sued by the plaintiffs for vicarious liability for the torts allegedly committed by the first defendant. The first defendant, however, submitted that he had been pushed by the plaintiffs' father, which caused him to drop the said gun and that when he tried to reach and pick up the gun, he had struggled with the plaintiffs' father which eventually led the said gun to discharge and shots were fired, causing injuries to the first and second plaintiffs. It was the first defendant's argument therefore that the shots fired from the said gun to the plaintiffs during the incident were "accidental shots", thus the injuries/damages suffered by the first plaintiff and the second plaintiff were not caused by the first defendant. The second and third defendants, in essence, contended that the first defendant had acted in a frolic of his own which had nothing to do with his official duties as a driver of the Police Department and that the first defendant's acts in shooting the plaintiffs, were not in any way connected with the acts which he was authorised to do or was not something which he was employed to do in the course of his employment.

Held (allowing plaintiffs' claim against first defendant; dismissing plaintiffs' claim against second and third defendants):

(1) This court accepted and preferred the plaintiffs' version of events as it was more credible and consistent in that (i) it was the first defendant who pushed the first plaintiff and took out the gun to shoot the first plaintiff; (ii) that the said gun had fallen to the floor because of the intervention and struggle between the first defendant and PW2 and not because the first defendant was kicked hard from behind, and that the struggle was to prevent the first defendant from causing further harm; (iii) the gunshots fired at the first plaintiff were not accidental shots as the first defendant had intended to harm the first plaintiff for breaking off their marital relationship; it would appear that the first defendant's action in shooting

A the plaintiffs was consistent with the first defendant's past behaviour as evidenced by the aforesaid police reports lodged against him. (para 7)

(2) The first defendant owed a duty of care towards the plaintiffs not to cause any harm to them (*Donoghue v. Stevenson*, refd). The first defendant was in breach of that duty of care to the first and second plaintiffs as the first defendant did not accidentally shoot the first plaintiff but had instead intentionally shot the first plaintiff as the first plaintiff decided to divorce the first defendant. The first defendant ought to have foreseen that by taking out, utilising such a dangerous weapon and struggling with PW2 for control and possession of such a dangerous weapon, it was reasonably foreseeable that the persons in PW2's house might be shot. When the first defendant took out the said gun, he had a duty of care to ensure that persons in PW2's house would not be in any danger. The first defendant was in breach of that duty of care and arising out of that, the second plaintiff was shot and injured. (para 8)

(3) The first defendant admitted that the purpose of going to the plaintiffs' house was to discuss his marriage problems and this was confirmed by the evidence of PW2. Thus, there was no connection between the wrongful acts of the first defendant and the official duties which he was entrusted with by the second and third defendants as a driver for CID, Dang Wangi Police Station. (para 9)

(4) The first defendant had acted in his personal capacity, on a frolic of his own, which had nothing to do with his official duties as a driver in the CID when he caused injuries to the plaintiffs. Thus the first defendant's act was not committed within the official scope of his employment as the first defendant went to the first plaintiff's parents' house without the permission of his supervisor and for his own personal purpose. Therefore he was not at the material time a servant or agent of the second and third defendants. The second and third defendants were not vicariously liable for the acts of the first defendant when he shot the first and second plaintiffs. (para 9)

(5) This was a proper case for awarding exemplary damages (*Roshairee Abdul Wahab v. Mejar Mustafa Omar*, refd). The plaintiffs had proved that the acts of the first defendant was

"oppressive" or "arbitrary" or "unconstitutional" as the first defendant, being a policeman entrusted to protect the public, instead wrongfully utilised his service revolver to shoot the plaintiffs and harm them. Aggravated damages should also be awarded because the plaintiffs had proven that the first defendant intended to harm the first plaintiff, by the use of the said gun and thus caused physical and mental fear, anguish and distress. Thus, the first defendant was ordered to pay aggravated and exemplary damages of RM250,000 to each plaintiff herein. The court further awarded the sum of RM60,000 to the first plaintiff and the sum of RM25,000 to the second plaintiff as general damages. (paras 17-19)

Case(s) referred to:

Abdul Wahab Jam Jam v. Abdul Wahab Abdullah & Anor [2008] 7 CLJ 741 HC ***(refd)***

Batumalee Masilamani & Anor v. Thong Chan Leng & Anor [2003] 4 CLJ 95 HC ***(refd)***

Bernard v. Attorney General [2005] 2 LRC 561 ***(refd)***

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Cassell & Co Ltd v. Broome & Anor [1972] AC 1027 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Dyer v. Munday [1895] 1 QB 742 ***(refd)***

Keppel Bus Co Ltd v. Sa'ad Ahmad [1972] 1 LNS 53 HC ***(refd)***

Lister and Others v. Hesley Hall Ltd [2001] UKHL 22 ***(refd)***

Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***

Rookes v. Barnard And Others [1964] 1 All ER 367 ***(refd)***

Rose v. Plenty [1976] 1 All ER 97 ***(refd)***

Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39 HC ***(refd)***

Samin Hassan v. Government of Malaysia [1976] 1 LNS 139 FC ***(refd)***

Seow Gek Soo (MW) & Anor v. Chia Mun Fook & Other Cases [1989] 1 CLJ 985; [1989] 2 CLJ Rep 447 HC ***(refd)***

Warren v. Henlys Ltd [1948] 2 All ER 935 ***(refd)***

Wee Wee Kim dan Satu lagi v. Siva Ananthan Nair G Sugumaran dan Satu Lagi [1999] 1 LNS 138 HC ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, s. 53

For the plaintiff - Manoharan Malayalam; M/s M Manoharan & Co
For the 1st defendant - Gajalaxmi Rengasamy; M/s Nagarajan Peri & Co
For the 2nd & 3rd defendants - Nor Mastura Ayub (Kasthuri Arumugam with her); SFCs

Reported by Suhainah Wahiduddin

A

JUDGMENT

Lee Heng Cheong JC:

Introduction

B **[1]** The first defendant, was a police officer at the material time and he and the first plaintiff were married on 6 March 2009. The second plaintiff is the elder brother of the first plaintiff. The second defendant at the material time was the Ketua Polis Negara and among others, has the power to instruct and control all the duties C and work of the members of the Polis Diraja Malaysia including the first defendant. The third defendant is the Government of Malaysia and is the employer of the first and second defendant.

Agreed Facts Between The Plaintiffs And The First D **Defendant**

[2] (a) The first plaintiff is a Malaysian citizen who is residing at No. D-10-9, PPR Kerinchi, Lembah Pantai, Jalan Pantai Permai 1, Pantai Dalam, 59200 Kuala Lumpur.

E (b) The second plaintiff is a Malaysian citizen who is residing at No. D-10-9, PPR Kerinchi, Lembah Pantai, Jalan Pantai Permai 1, Pantai Dalam, 59200 Kuala Lumpur.

(c) The first defendant was at all material times is a police personnel who is attached to Dang Wangi police station, F Transportation Branch of the Criminal Investigation Division and also residing at No. 10, Jalan Sungai Rincing 32/65B, Bukit Rimau, Shah Alam, Selangor.

(d) The first defendant was supplied with a .38 Smith & G Wesson revolver ("the said gun") by the second and third defendants.

(e) The first plaintiff and the first defendant were married on 6 March 2009.

H (f) The marriage between the first plaintiff and the first defendant were registered at National Registration Department of Malaysia, Putrajaya before the Registrar of Marriage, Arokiamary Josephine a/p Sawirnathan on 6 March 2009.

I (g) The marriage has been dissolved by the High Court of Malaya at Kuala Lumpur on 28 June 2012 through Petition No: 33-6-01/2012 under s. 53 of the Law Reform Act 1976.

(h) The first defendant at around 9.20pm on 2 March 2010, arrived at the first plaintiff's house to discuss with the first plaintiff.

(i) The first plaintiff pleaded that, the first plaintiff has notified the first defendant that the first plaintiff do not wish to continue her relation with the first defendant.

(j) There is a shot from the first defendant's gun, a .38 Smith & Wesson revolver.

(k) The first plaintiff has suffered injuries due to the first defendant's shot from the first defendant's gun, a .38 Smith & Wesson revolver.

(l) On 2 March 2010, the first defendant was on 24 hours duty ie, from 7.45am until 7.45am of 3 March 2010 and at all material times the first defendant is on official duty.

(m) The first defendant was charged and found guilty at Sessions Court for shooting the first plaintiff.

(n) The first defendant was on 12 March 2010, charged at the Sessions Court at Kuala Lumpur on the following charge:

> That you on 02.03.2010 at about 9.40 P.M at Block D-10-09, PPR Kerinchi, Pantai Dalam in Brickfields District, in the Federal Territory of Kuala Lumpur, has shot PREMA A/P GANASON with a revolver .38 smith & wesson within the knowledge and in the position that your action can cause death to Prema a/p Ganason, you will be found guilty of murder and the said action has caused injury to Prema a/p Ganason and you are thereby commit an offence under section 307 of Penal Code and will be sentence under the same section.

(o) The first defendant was on 4th day of October 2011, sentenced to imprisonment for seven years, commencing from 4 October 2011.

(p) The Sessions Court Judge, Tuan Haji Mohamad Sekeri bin Mamat found that the prosecution has proved their case against the first defendant, of shooting the first plaintiff, beyond reasonable doubt.

(q) The first defendant has filed an appeal against the decision of the said Sessions Court Judge.

A **Agreed Facts Between The Plaintiff And The Second And Third Defendant**

[3] (a) The first defendant was at all material times a police personnel who is attached to the Transportation Branch
B of Dang Wang police station and under the Commercial Investigation Division and who is residing at No. 10, Jalan Sungai Rincing 32/95B, Bukit Rimau, Shah Alam, Selangor.

(b) The second defendant was authorised to instruct and
C control the duties of the Royal Malaysian police personnel.

(c) The first defendant was supplied with a .38 Smith & Wesson revolver as a driver of the transportation branch
D of the criminal investigation department at that material time.

(d) The first defendant on 2 March 2010 went to the first plaintiff's house at No. D-10-9, PPR Kerinchi, Lembah
E Pantai, Jalan Pantai Permai 1, Pantai Dalam, 59200 Kuala Lumpur and shot the first plaintiff.

(e) The first defendant was on 24 hours duty from 8am on 2 March 2010 until 8am on 3 March 2010.

F (f) At about 8.15am, the first defendant was supplied with a .38 Smith & Wesson Revolver from the Tun HS Lee police station Kuala Lumpur.

(g) The incident where the first defendant shot the first
G plaintiff, occurred at the first plaintiff's father's house.

(h) The first defendant was tried and convicted by the Sessions Court for shooting the first plaintiff.

(i) The first defendant was on 12 March 2010 charged at
H the Sessions Court at Kuala Lumpur on the following charge:

> That you on 02.03.2010 at about 9.40 p.m at block D-10-09, PPR Kerinchi, Pantai Dalam in Brickfields
I District, in the Federal Territory of Kuala Lumpur, has shot Prema a/p Ganason with a revolver 38 smith & wesson within the knowledge and in the position that your action can cause death to Prema a/p Ganason, you

will be found guilty of murder and the said action has caused injury to Prema a/p Ganason and you thereby commit an offence under section 307 of Penal Code and will be sentence under the same section.

(j) The first defendant was on 4 October 2011, sentenced to imprisonment for seven years commencing from 4 October 2011.

(k) The Sessions Court Judge, Tuan Haji Mohamad Sekeri bin Mamat, found that the prosecution has proved their case against the first defendant of shooting the first plaintiff, beyond reasonable doubt.

(l) Further, disciplinary action has been taken against the first defendant and he has been suspended pending his appeal against the decision of the said Sessions Court.

(m) The first defendant has misused the weapon supplied to him.

The Plaintiff's Case

[4] In essence, the plaintiff's claim against the first defendant is for the torts of assault, battery and negligence and the second and third defendants are being sued for vicarious liability for the torts allegedly committed by the first defendant. The plaintiffs contend that the first defendant shot the first and second plaintiffs during the course of his employment and thus the second and third defendants are vicariously liable for the injuries suffered by the plaintiffs.

The First Defendant's Case

[5] (a) The first defendant's case is that on 2 March 2010, the day of the incident, the first defendant received a phone call from his father-in-law (PW2) whereby he was invited to come over to the father-in-law's house [where the first and second plaintiffs were staying at that material time], at Block D-10-09, PPR Kerinchi, Pantai Dalam to discuss the marriage problems between the first defendant and the first plaintiff. The first defendant stated that he received an "incoming call" from his father-in-law (PW2) and informed DW1 ("Pegawai Tatatertib") who confirmed this, when giving his testimony in court during the trial.

(b) The first defendant also stated that he received an invitation from his father-in-law (PW2) including the "SMS" which he sent to PW2, to confirm his attendance at the premise of PW2 on 2 March 2010. Thus the first defendant contended that he went to his father-in-law's house (PW2's house) on the invitation of PW2 himself and not by requesting and getting the permission of PW2, to go over to PW2's house as stated by PW2 in his testimony during the trial.

(c) As a police officer at the crime investigation department of the Dang Wangi police station, the first defendant was given the said gun, by the police department to protect himself from any threat/danger. On the day of the shooting incident on 2 March 2010, the first defendant was on 24 hours duty whereby he started work at 0745 in the morning of 2 March 2010 and end at 0800, 3 March 2010. However, on that particular day, the first defendant was not feeling well as he had a problem with his ears and he obtained permission from his supervisor (DW6), to seek medical treatment at Pusat Perubatan Universiti Malaya (PPUM). Since the first defendant had received an invitation *via* a telephone call from his father-in-law (PW2), to go over to his place at Pantai Dalam and since PW2's house is situated very near and on the way to PPUM, the first defendant had decided to drop by at PW2's house before going to PPUM to seek treatment.

(d) At the house of his father-in-law (PW2), the first defendant met the first plaintiff to discuss about their marriage problems. The first plaintiff refused to continue her marriage relationship with the first defendant and requested the first defendant to divorce her. The first defendant agreed to divorce his wife and requested the first plaintiff to return all the jewelleries that was given by him to the first plaintiff during the marriage.

(e) The first plaintiff then walked towards her room to get the said jewelleries, in order to return them to the first defendant. When the first defendant was standing at the door, just outside the first plaintiff's room, the first defendant was suddenly, pushed very hard from behind by PW2 (the father of the plaintiffs) and this caused the first defendant and the said gun he was carrying, to fall on the floor of the first plaintiff's room.

(f) The first defendant tried to reach and pick up the said gun which had fallen on the floor of the first plaintiff's room, PW2 (the plaintiffs' father) at the same time, also struggled with the first defendant, in trying to reach and take the said gun. The first defendant warned PW2 that there were bullets in the said gun and told PW2, not to pull the said gun as it can cause the said gun to discharge. The struggle between the first defendant and PW2, in grabbing the said gun eventually led the said gun to discharge and a few shots were fired from the said gun due to the struggle and caused injuries to the first and second plaintiffs.

(g) The first defendant also contends that the first defendant did not owe any duty of care to the plaintiffs as a reasonable man under the same circumstances would not have foreseen that there would be a struggle at PW2's house which would lead to the said shooting incident.

(h) The first defendant further contends that if this court finds that there is a duty of care owed by the first defendant to the plaintiffs in this case, the first defendant did not breach that duty of care.

(i) Further the first defendant contends that his conduct cannot be said to have caused the injuries suffered by the plaintiffs because there was a struggle between the first defendant, PW2 and also PW4 which caused the said gun to discharge. Therefore, the shots fired from the said gun which caused injuries to the plaintiffs during the incident were "accidental shots" due to the struggle between the first defendant, PW2 and also PW4 and not caused by the conduct of the first defendant who tried his level best to reach and retrieve back the said gun which had fallen on the floor. Thus, the injuries/damages suffered by the first plaintiff and the second plaintiff are not caused by the first defendant.

The Second And Third Defendants' Case

[6] The second and third defendants in essence contend that the first defendant had acted in a frolic of his own which had nothing to do with his official duties as a driver of the police department and that the first defendant's acts in shooting the

plaintiffs, were not in any way connected with the acts which he was authorised to do or was not something which he was employed to do or does in the course of his employment.

Consideration Of The Plaintiffs' Case Against The First Defendant

[7] (i) The first defendant's defence in essence is that he was pushed from behind and as a result of that, the said gun fell onto the floor and that there was struggle initially between him and PW2 and that the gunshots from the said gun which injured the first and second plaintiffs herein were discharged accidentally arising from the struggle between the first defendant and PW2.

(ii) The first plaintiff testified that during cross-examination that while she was walking towards her room, to collect and return the jewelleries, to return to the first defendant, she was pushed from behind by the first defendant and as a result, the first plaintiff fell and the first defendant immediately pointed the said gun at the first plaintiff's head and fired the shots. PW4 in his testimony said that at the material time when the first defendant met with the first plaintiff, he was in his room and when he heard the gunshots, he rushed out and saw PW2 struggling with the first defendant, to gain control over the said gun. In the process of struggling with the first defendant, to gain control of the said gun, PW4 was shot in the chest by the first defendant.

(iii) This court accepts and prefers the plaintiffs' version of events in this case as it is more credible and consistent and finds as follows:

(a) that it was the first defendant who asked for consent from PW2 to visit the house and meet with PW5.

(b) that it was the first defendant who pushed the first plaintiff, down to the floor of her room and took out the said gun to shoot the first plaintiff and that the first defendant was not pushed hard from behind which caused to fell and the said gun to fall onto to the floor. Based on the first defendant's version of events, it would appear that PW2 planned to invite the first defendant to his house, for the purpose of assaulting

him. From the evidence adduced, this court finds that it is most unlikely that PW2 would intentionally invite the first defendant to his house for the purpose of assaulting him, knowing that the first defendant is a policeman, well trained in self defence and likely to be armed and hoping to get away with this alleged crime.

(c) The plausible reason why the first defendant failed to shoot the first plaintiff in the head, is most probably due to the defensive actions taken by the first plaintiff to protect herself and the subsequent intervention and assistance of PW2 and PW4. This court finds that it is most probable that the said gun fell to the floor because of the intervention and struggle between the first defendant and PW2 and not because the first defendant was kicked hard from behind. Further this court would expect the said gun to be properly holstered or secured by the first defendant and that the said gun would not be so easily dislodged and fell onto the floor.

(d) that the gunshots fired at the first plaintiff were not accidental shots as the first defendant intended to harm the first plaintiff for breaking off her marital relationship with him. From the various police reports lodged against the first defendant, (Please see police reports tendered as in pp. 18, 19, 22, 23, 199, 200, 201, 211, 212, 215 and 280 of bundle B), it would appear that the first defendant's action in shooting the plaintiffs is consistent with the first defendant's past behaviour as evidenced by the aforesaid police reports lodged against him.

(e) that the gunshot which injured the second plaintiff was discharged as a result of the struggle between the first defendant and PW2 when PW2 sought to gain possession of the said gun, to prevent the first defendant, from causing further harm.

(f) that the first defendant brought the poison to the plaintiffs' house and attempted to commit suicide after shooting the first and second plaintiffs and PW2 stopped the first defendant, from committing suicide.

(g) that the first defendant had planned the whole thing when he went to the plaintiffs' house, with the purpose of harming the first plaintiff and then committing suicide.

(iv) Having observed the manner and demeanour of the witnesses for the parties when they testified, this court finds in particular that the evidence of the plaintiffs are more consistent and credible and that the first defendant is not a credible witness.

(v) This court is guided by *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] 2 MLJ 62, the Court of Appeal stated *inter alia* as follows:

> It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. *Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.*
>
> [emphasis added]

Whether The First Defendant Was Negligent In Causing Injuries To The First And Second Plaintiffs?

[8] (i) To succeed in their claims against the first defendant, the plaintiffs have to prove three essential elements which are as follows:

(a) The first defendant owes a duty of care towards the first and second plaintiff;

(b) The first defendant breaches that duty of care; and

(c) The injuries/damages suffered by the first and second plaintiffs are caused by the first defendant's said breach of duty.

(ii) This court finds that it is clear that the first defendant owes a duty of care towards the plaintiffs in not to cause any harm to them and that the principle of the duty of care was laid down in *Donoghue v. Stevenson* [1932] AC 562 where Lord Atkins stated as follows:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour, and the lawyer's question 'who is my neighbour' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonable to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

(iii) This court further finds that the first defendant is in breach of that duty of care to the first and second plaintiffs as the first defendant did not accidentally shoot the first plaintiff but instead intentionally shoot the first plaintiff as the first plaintiff decided to divorce the first defendant.

(iv) In so far as the shooting of the second plaintiff is concerned, since the first defendant took out the said gun to shoot the first plaintiff and the said gun accidentally discharged whilst in the midst of a struggle between the first defendant and PW2 for control and possession of the said gun which resulted in the second plaintiff being shot and injured. This court finds that the first defendant ought to have foreseen that by taking out, utilising such a dangerous weapon and struggling with PW2 for control and possession of such a dangerous weapon, it is reasonably foreseeable that persons in the PW2's house might be shot. In the light of the aforesaid, this court finds that when the first defendant took out the said gun, he had a duty of care to ensure that persons in PW2's house would not be in any danger, that the first defendant is in breach of that duty of care and arising out of that breach of duty of care, the second plaintiff was shot and injured.

A **Consideration Of The Plaintiffs' Case Against The Second And Third Defendants' Case**

[9] (i) The plaintiffs contends that the second and third defendants are vicariously liable for the tortious acts of the first defendant on the following grounds:

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(a) The first defendant admitted that he was on duty for 24 hours at the material time;

(b) The first defendant was supplied with the said gun and he did not return the said gun;

C

(c) Failure to take any action on the police report lodged by the first defendant, ie, exh. D2;

(d) Failure to confiscate the first defendant's weapon; and

D

(e) Hiring a person who is irresponsible and of unsound mind like the first defendant as a member of the police force.

E

(ii) It is trite that in order to hold the second and third defendants, vicariously liable for the tort committed by the first defendant, the plaintiffs must establish three essential elements namely (i) that the employee (tortfeasor) was under the employment of the defendant; (ii) that the employee had committed a tort; and (iii) the employee had committed the tort during the course of employment.

F

G (iii) To determine whether the first defendant's acts are within the course of employment, guidance is sought from the case of the Privy Council in *Bernard v. Attorney General* [2005] 2 LRC 561 where the Privy Council held *inter alia* as follows:

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> Vicarious liability, a principle of strict liability, was liability for a tort committed by an employee not based on any fault of the employer. The traditional test, asking whether the act was a wrongful and unauthorised mode of performing an act authorised by the employer, was not entirely appropriate in cases of intentional wrongs. *The correct approach was to concentrate on the relative closeness of the connection between the nature of the*

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employment and the particular tort and to ask whether, looking at the matter in the round, it was just and reasonable to hold the employer vicariously liable.

(emphasis added)

(iv) This principle of law has been adopted and applied in the following cases:

(a) *Samin Hassan v. Government of Malaysia* [1976] 1 LNS 139; [1976] 2 MLJ 211 where the Federal Court held that:

> This appeal is concerned with the liability of the master for his servant. The master should shoulder the servant's liability if at the material time the servant was acting in the course of the employment and for the business of the employer. The meaning of the words 'in the course of employment' was fully considered by the House of Lords in *Davidson v. M Robb*, and the headnotes of the law reports read:
>
> > *In the course of employment' does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incidental to it and absence on leave for the workman's own purposes is an interruption of the employment.* (emphasis added)

(b) In *Rose v. Plenty* [1976] 1 All ER 97, pp. 100-101 per Lord Denning (CA) held as follows:

> In considering whether the prohibited acts were within the course of the employment, **it depends very much on the purpose for which it is done**. If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act ... **But if it is done for some purposes other than his master's business ... such an act, if prohibited, may not be within the course of employment**.
>
> (emphasis added)

(c) In *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653; [2009] 6 MLJ 826, the Court of Appeal cited Lopes LJ's statement in *Dyer v. Munday* [1895] 1 QB 742 (CA) as follows:

> The law says that for all acts done by a servant in the conduct of his employment, and furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

(d) In *Lister and Others v. Hesley Hall Ltd* [2001] UKHL 22, the House of Lords held that:

> When determining whether an employer was vicariously liable for an employee's wrongful act, *it was necessary to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, taking a broad approach to the nature of employment by asking what was the job on which the employee was engaged for his employer.*
>
> (emphasis added)

(v) From the above cases, it is clear that there are two important issues that need to be determined that is whether the first defendant's act was so closely connected with the acts that he was authorised to do for the purposes of liabilities of the second and third defendants. The first issue is whether the first defendant's act was in the furtherance of his entrusted duties and the second issue is whether the first defendant's act was done for the benefit of the second and third defendants.

(vi) Whilst at the material time, the first defendant was on duty as a 24-hour driver under the CID, IPD Dang Wangi, the first defendant was granted permission to leave the police station, to go to the hospital to get medical treatment for his ear ache. However, instead of going to hospital, the first defendant decided to go to the first plaintiff's parents' house.

(vii) The first defendant in his evidence admitted that the purpose of going to PW5's parents' house was to discuss his marriage problems with PW5 and this was confirmed by the evidence of PW2. Thus this court

finds that there was no connection between the wrongful acts of the first defendant and the official duties which he was entrusted by the second and third defendants as a driver for CID, Dang Wangi Police Station.

(viii) Further, the first defendant's act's in shooting and causing injury to the plaintiffs was done in his personal capacity as the first plaintiff's husband, on a frolic of his own and for his own personal benefit or purpose which had nothing to do with his official duties.

(ix) This court is also guided by the case of *Keppel Bus Co Ltd v. Saad Ahmad* [1972] 1 LNS 53; [1972] 2 MLJ 121, where the Privy Council held *inter alia* that the act of the bus conductor in hitting the respondent was done outside the scope of employment as when the battery occurred, the source of the battery, namely the elderly lady, was no longer on the bus. The conductor was therefore acting on his emotions, which were unrelated to his employment. His employer was therefore not liable.

(x) In *Warren v. Henlys Ltd* [1948] 2 All ER 935, Hilbery J in this case gave judgment for the defendants and held (pp. 937-938):

> It is a statement of law which is to be found in *Salmond On Torts* ... a little further on (p. 90) ...
>
> > *... if the unauthorized and wrongful act ... is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for such a case the servant is not acting in the course of employment, but has gone outside of it.*
>
> Is there any evidence here ... could find that this assault, committed in the circumstances ... was so connected with the acts which the servants was expressly or impliedly authorized to do as to be a mode of doing those acts? It seems to me the answer must be "No" ...
>
> *It seems to me that it was an act entirely of personal vengeance. He was personally inflicting punishment, and intentionally inflicting punishment, on the plaintiff because the plaintiff proposed to take a step which might affect*

> *Beaumont in his own personal affairs. It had no connection whatever with the discharge of any duty for the defendants. The act of assault by Beaumont was done by him in relation to a personal matter affecting his personal interests …*
>
> (emphasis added)

(xi) In *Samin Hassan v. Government of Malaysia* [1976] 1 LNS 139; [1976] 2 MLJ 211, the plaintiff was knocked down by the defendant who was driving a land rover belonging to the Telecoms department. The defendant had driven the vehicle back to his house and the accident occurred whilst he was on his way back to the depot. The defendant had written down in a logbook that the purpose for bringing the vehicle out of the compound was to test its brakes. Evidence was tendered later that the brakes did not require any testing. The Federal Court then held:

> Returning to the facts of this present case, the learned trial judge had found that the brakes of the Land Rover did not require attention, that the first defendant had no permission to take the Land Rover put to test its brakes, that the first defendant had taken out in order to go home for his lunch, and that purpose was his own purpose and not the purpose of the Government.

(xii) Thus this court finds that the first defendant had acted in his personal capacity, on a frolic of his own which had nothing to do with his official duties as a driver in the CID when he caused injuries to the plaintiffs. Thus the first defendant's act was not committed within the official scope of his employment as the first defendant went to the first plaintiff's parents' house without the permission of his supervisor and for his own personal purpose and therefore he was not at the material time a servant or agent of the second and third defendants. In the circumstances, this court finds that the second and third defendants are not vicariously liable for the acts of the first defendant when he shot the first and second plaintiffs.

(xiii) In the plaintiffs' statement of claim, the plaintiffs contend under their claim of negligence against the second and third defendants as follows:

(a) Failure to take any action on the police report lodged by the first plaintiff, that is, exh. D2; A

(b) Failure to confiscate the first defendant's weapon; and

(c) Hiring a person who is irresponsible and of unsound mind like the first defendant as a member of the police. B

(xiv) On the contention that the second and third defendants' failure to take any action on the police report lodged by the first plaintiff, that is, exh. D2, this court finds that this contention is without basis as DW4 had taken action upon receipt of exh. D2. DW4 stated in his evidence that he had called the first plaintiff to record her statement and subsequently called the first defendant, to come to the Brickfields police station for discussion. This was done after consulting the first plaintiff who agreed to it. After the discussion, both parties agreed to settle this matter whereby the first defendant had promised not to repeat his wrongful behaviour and the first plaintiff agreed not to take up the matter further and she did not want the first defendant, to disturb her anymore. DW4's evidence was substantiated by the evidence of the first plaintiff. C D E F

(xv) As regards the issue of the second and third defendants' failure to confiscate the first defendant's weapon, this court also finds that this contention is also without basis because regardless of the conflicting evidence between DW4 and the first defendant as to when the weapon was taken from DW2, it was clear from the evidence adduced that ultimately DW4 did confiscate the first defendant's weapon after receipt of the first plaintiff's complaint in exh. D2. G H

(xvi) The plaintiffs also contend that the second and third defendants hired a person who is irresponsible and of unsound mind like the first defendant as a member of the police department. This court also finds that this contention is without basis as there is no credible evidence adduced by the plaintiffs to support such a contention or that the first defendant was irresponsible and of unsound mind at all material times. I

Injuries Suffered By The First Plaintiff (PW5)

[10] The injuries by the first plaintiff are as follows:

(a) Comminuted fracture of the proximal phalanx (P1) of her left index finger;

(b) A through and through bullet wound of her right forearm, affecting the ulnar nerve and causing a unicortical fracture of the right proximal ulna; and

(c) A superficial chest wound.

(Please refer to pp. 254-257 of bundle B).

[11] Based on the testimony of PW1, Dr Sharifah Roohi binti Shed Waseem, she stated as follows:

(a) that the first plaintiff cannot use left index finger for pinch grip;

(b) that the first plaintiff lost the pinch and grip; and

(c) that the first plaintiff will always have the sort of current feeling on that portion of the finger.

[12] The injuries suffered by the first plaintiff were caused by shots fired by the first defendant and the first plaintiff had undergone mental anguish and distress. (Refer to police reports tendered as in pp. 18, 19, 22, 23, 199, 200, 201, 211, 212, 215 and 280 of bundle B).

[13] The injuries by the second plaintiff (PW4) are as follows:

(a) A lacerated wound 4cm front of right side of forehead;

(b) Mental anguish and distress.

Consideration On The Quantum Of Damages

[14] This court finds that the plaintiffs have failed to prove their special damages as no oral or documentary evidences were led in support of the plaintiffs' claim for special damages of the sum of RM9,422.15 as no relevant bills and receipts were tendered as evidence. Thus the plaintiffs are not entitled to special damages as pleaded.

Exemplary And Aggravated Damages

[15] This court finds that this is a proper case for awarding exemplary damages and is guided by the case of *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1996] 1 CLJ Supp 39; [1996] 3 MLJ 337 at p. 339 where the court held *inter alia*:

> An award for exemplary damages was aimed at punishing the defendants, and displaying the court's indignant attitude towards the acts committed. However, such damages must be restricted to **oppressive, arbitrary or unconstitutional action by the servants of the government or where the defendant's conduct had been calculated to make a profit.** As these assaults were outside these two categories, exemplary damages would not be awarded (see p. 348B-E); *Rookes v. Barnard & Ors* [1964] AC 1129 followed.
>
> (emphasis added)

[16] Further, exemplary damages could only be awarded when the court is of the view that the general and special damages are inadequate to punish the defendants. In *Rookes v. Barnard And Others* [1964] 1 All ER 367 at p. 411, Lord Devlin held as follows:

> In a case in which exemplary damages are appropriate, *a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.*
>
> (emphasis added)

[17] This court finds that exemplary damages should be awarded in the present case because the plaintiffs have proved that the acts of first defendant are "oppressive" or "arbitrary" or "unconstitutional" as the first defendant, being a police man entrusted to protect the public instead wrongfully utilised his service revolver to shoot the first and second plaintiffs and harm them.

Aggravated Damages

[18] This court also finds that aggravated damages ought to be awarded to compensate the plaintiffs for their injured feelings which has been caused or aggravated by the first defendant's

wrongful act. Reference is made to *Cassell & Co Ltd v. Broome & Anor* [1972] AC 1027 at p. 1124 where Lord Diplock held as follows:

> Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls 'aggravated damages'.

[19] This court finds that aggravated damages should be awarded in the present case because the plaintiffs have proved that the first defendant intended to harm the first plaintiff, by the use of the said gun and thus caused physical and mental fear, anguish and distress. The first defendant has abused his position as policeman and the said gun given to him for his official duty and has acted contrary to *inter alia* the Police Act 1967. Prior to the shooting incident, the first defendant has also been stalking the first plaintiff. (Please see police reports tendered as in pp. 18, 19, 22, 23, 199, 200, 201, 211, 212, 215 and 280 of bundle B).

[20] On the issue of general damages, having considered the case of *Batumalee Masilamani & Anor v. Thong Chan Leng & Anor* [2003] 4 CLJ 95; [2003] 4 MLJ 391 where the court awarded the sum of RM20,000 was awarded for a simple fracture, the case of *Abdul Wahab Jam Jam v. Abdul Wahab Abdullah & Anor* [2008] 7 CLJ 741 where the court awarded the sum of RM60,000 for fracture of right radius and right ulna, the case of *Seow Gek Soo (MW) & Anor v. Chia Mun Fook & Other Cases* [1989] 1 CLJ 985; [1989] 2 CLJ Rep 447, where the court awarded for fracture of ulna, RM17,000 was awarded as general damages and the case of *Wee Wee Kim dan Satu lagi v. Siva Ananthan Nair G Sugumaran dan Satu Lagi* [1999] 1 LNS 138; [1999] 4 MLJ 284, where the court awarded the sum of RM25,000 for close comminuted fracture of right femur and close fracture of the lower third right radius and ulna, this court awards the sum of RM60,000 to the first plaintiff and the sum of RM25,000 to the second plaintiff.

[21] Thus this court also finds that it is fit and proper case to grant aggravated and exemplary damages and this court orders the first defendant to pay aggravated and exemplary damages each of the plaintiffs herein.

Order

[22] (i) In the light of this court's above findings, this court finds that the plaintiffs have their case against the first defendant, on a balance of probabilities. In the premises, this court grants an order in terms of the plaintiff's statement of claim with cost and awards the sum of RM60,000 to the first plaintiff and the sum of RM25,000 to the second plaintiff, being general damages. This court also finds that it is fit and proper case to grant aggravated and exemplary damages and this court orders the first defendant to pay aggravated and exemplary damages of RM250,000 to each of the plaintiffs herein.

(ii) As regards the plaintiff's case against the second and third defendant, this court finds that the plaintiff have failed to prove their case against the second and third defendant, on a balance of probabilities and therefore dismiss the plaintiffs' case against them accordingly, with cost.